SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-1110

ANTHONY J. BUFFA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

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CERTIFICATE OF SERVICE

James Easly, a member of the Bar of the Supreme Court of the United States and counsel of record for Anthony J. Buffa, petitioner herein, hereby certifies that on February __, 1976, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for a Writ of Certiorari on the Solicitor General of the United States, Respondent herein, by depositing such copies in the United States Post Office, Cleveland, Ohio, with air mail postage prepaid, properly addressed to the post office address of the Solicitor General at Department of Justice, Washington, D.C., 20503.

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All parties required to be served
have been served.

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In The

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No.

ANTHONY J. BUFFA,
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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit

Petitioner, Anthony J. Buffa, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit entered December 17, 1975, affirming the Judgment of Conviction entered by the United States District Court for the Northern District of Ohio, Eastern Division on November 21, 1974.

OPINIONS

The District Judge did not render an opinion. The opinion of the Court of Appeals appears in Appendix A. It has not yet been published.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1975. The Petition for Rehearing, timely filed, was denied on January 14, 1976 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether or not a charge to the jury of both subparts of Section 2 of Title 18 with respect to the same set of facts is plain error, is an important question of Federal Law which has not been, but which should be, settled by this Court.

2. Whether or not the Court of Appeals by omitting from its opinion facts which appear on the face of the records so as to sustain its judgment has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V.

"No person shall . . . nor be deprived of life, liberty, or property, without due process of law . . ."

Title 18 U.S.C., Section 2.

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

"(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Title 18 U.S.C., Section 472.

"472. Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the

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United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Title 18 U.S.C., Section 473.

"473. Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

Supreme Court Rule No. 19, 1(b).

"1—A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor . . ."

"(b) Where a Court of Appeals . . . has decided an important question of Federal Law, which has not been, but should be, settled by this Court . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision."

STATEMENT

To charge a jury as to one offense with both sub-parts of Section 2 is plain error.

As to each count, the trial court charged the jury with both sub-parts of Section 2, which is plain error.[1] The sub-parts of Section 2 are mutually exclusive, both sub-parts cannot apply to the same set of facts.

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[1] The Attorney who tried the case in the District Court made no objections during the trial.

Sub-part (a) of Section 2, Title 18 reads as follows:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

This sub-section applies to the general situation where a person assists another who commits an offense. It requires at least two participants.

Sub-part (b) reads as follows:

"(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

This sub-section may be violated by one person and refers to the act of an innocent agent of said person.

Clearly, sub-part (a) cannot apply to facts to which sub-part (b) does apply, and vice versa.

The charge confused the jury, which, on two occasions, while deliberating, requested additional instructions from the Court in regard to aiding and abetting.

On the first occasion, the jury asked: "Does aiding and abetting pertain to Count 6, Count 7 and Count 8?" The Court advised the jury that Section 2 pertained to all the counts (R.T., p. 173).[2]

Later, the jury asked the Court (R.T., p. 174): "Please clarify aiding and abetting." The Court responded by reading his charge as previously given (R.T. pp. 151-153) (J.A. 36a-38a)[3].

Thereafter the jury returned a verdict of guilty on all counts.

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[2] "R.T." refers to Reporter's Transcript.

[3] "J.A." refers to the Joint Appendix in the Court of Appeals.

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The Court of Appeals, knowingly ignoring the record, so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioner was convicted in a jury trial of violating the following sections of Title 18:

Count six: selling conterfeit currency, Section 472 and aiding and abetting, Section 2.

Count seven: possession of counterfeit currency, Section 472 and aiding abetting, Section 2.

Count eight: transferring counterfeit currency, Section 473 and aiding and abetting, Section 2.

However, the Court of Appeals knowingly ignored the three convictions for violating Section 2 and stated that petitioner had been convicted of violating 472 and 473. There is not one word in the opinion about Section 2.

In thus seeking to avoid disclosing the issue raised in regard to Section 2, the Court of Appeals turned to an issue arising from a charge given by the trial court to the jury, stating:

"The principal issue on this appeal is whether the Court erred in the following portion of its instruction to the jury:

"While it is necessary that every essential element of the crime charged in the indictment in this case be proved beyond a reasonable doubt, it is not necessary that each subsidiary fact shall be proved beyond a reasonable doubt."

The Court of Appeals then argued that the above charge could not be confusing to the jury because of the effect of the overall charge, concluding, finally, that there was no plain error:

"Courts have always shown a reluctance to find plain error when the case was not a close one and the evidence against a Defendant was overwhelming, as we find the evidence to be in this case."

It is obvious what the Court of Appeals had to do in order to hold that there was no plain error in the above charge; it had to find that the "evidence was overwhelming".

In order to find that the "evidence was overwhelming", the Court of Appeals had to conceal the fact that the jury, during its deliberations, had twice requested additional instructions in regard to aiding and abetting. The Court would not have had the temerity to find that the "evidence was overwhelming" if the two requests of the jury for instructions as to aiding and abetting had been disclosed in its opinion. Further, the requests pertained to aiding and abetting and not to the substantive offenses, Sections 472 and 473.

In order to avoid disclosing such two requests, the Court of Appeals had to bury any reference to Section 2.

And so the Court of Appeals neatly buried Section 2: "We have considered the other issues raised by Defendant on appeal and find them to be without merit."

In the process of submerging Section 2, it was not fair or honest for the Court of Appeals to say: "The principal issue on this appeal is whether the Court erred in the . . ." charge about the subsidiary fact.

The "subsidiary fact" charge appears not to have been given ever before by any Court. The issue thereon raised was of interest to the petitioner alone and to no one else. However, it was appropriate to raise it in the Court of Appeals as constituting plain error. And the Court of Appeals would have had to so hold, absent the gambit on the finding that the "evidence was overwhelming".

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On the other hand, the issue raised on the charging of Section 2 pertains to practically all criminal cases in which juries are charged throughout the United States and has not been decided by this Court. The Court of Appeals well knew that the issue as to Section 2 was of national importance.

REASONS FOR GRANTING THE WRIT

The issue as to charging both sub-parts of Section 2 of Title 18 U.S.C. to the same facts presents a Federal question of substance with widespread public importance.

Every day throughout the land, district judges are charging juries in criminal cases with a substantive statute and with Section 2.

As appears from the mutually exclusive language of the two sub-parts of Section 2, only confusion can result from charging both sub-parts. Any attempt at reconciliation of the two sub-parts can only lead to frustration. At that point, juries begin to speculate and Defendants are deprived of a fair trial and due process of law.

Section 2 is clear on its face that the two sub-parts are irreconcilable. To present the jury with both sub-parts to apply to the same facts actually can accomplish nothing, except confusion.

When two theories are submitted to a jury, one of which is incorrect, a general verdict of guilty must be reversed even though the jury was properly instructed upon the alternate theory. *Williams v. State of North Carolina*, 1942, 317 US 287, 87 Led 279; *Stromberg v. People of State of California*, 1930, 283 US 359; 75 Led 1117.

As the Court said in *Yates v. United States*, 1957, 354 US 298 at 312; 1 Led 2d 1356 at 1371:

> "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."

Although it appears that in many cases as in the case at bar, Courts have charged both sub-sections of Section 2 but no objection was made and so there was no ruling on the correctness of charge.

On the other hand however, some Courts have shown discrimination and have specifically charged sub-section (b) only. *U.S. v. Inciso* (7 CA-1961) 292 F2d 374; *U.S. v. Barash* (2 CA-1968) 412 F2d 26. No Court seems to have specifically charged sub-section (a) only.

The charge of the Court violated the due process clause of the Fifth Amendment. The Federal question herein has not heretofore been determined by this Court.

As to rule 19, it must be said that this is not a case of inferences drawn from testimony nor of twisted facts derived from evidence about which there can be argument. Rather, it is a simple case of the knowing omission of facts which appear on the face of the record, i.e., the conviction of petitioner for violation of Section 2.

Clear it is that the error was plain and that the Court of Appeals should have reversed the trial court, for otherwise, there could be no purpose for the Court of Appeals to have followed such a devious path in order to reach affirmance.

It has been said that the Courts of Appeals have so molded the rules and the manner in which they may treat a case that they hold in their hands the power to finally decide a case either way as they may wish. In the case at bar, we have an illustration of this power – beyond any doubt whatever.

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It is the power to select the facts which will sustain the judgment decided by the Court; no longer is the decision drawn from all the facts. No longer are the results based on the facts; rather, the facts are selected to support the results; absolutely unlawful.

No system of laws can long endure when the administrators of the laws are themselves unlawful. Daily rise complaints about lawlessness in the country. Small wonder when the Courts themselves are lawless.

Respect for the Federal judiciary will not be restored until the Courts of Appeals are returned to a fundamental approach — to consider a case on the facts and the law and to draw the decision therefrom but not to decide the case and then fit the facts and law so as to support the decision.

Why should a group of men desire to take into their hands the untramelled power of life or death. The answer is not to be found in the sly smiles of the sophisticated for even sultans reach satiety.

Other people say that it is croneyism jurisprudence; that a Court of Appeals is very reluctant to bruise the tender feelings of a district judge by reversing him. Better a man convicted contrary to law go to prison, than a district judge feel slighted.

CONCLUSION

The problem facing this Court is indeed very formidable and it is not to be expected that the Courts of Appeals will meekly submit to remedial measures which are long past due if, indeed, they are not already too late. Drastic measures must be used if public confidence in the Federal Judiciary is to be restored.

As it now stands, petitioner respectfully submits that his Petition for a Writ of Certiorari should be granted.

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APPENDIX A

Opinion of the United States Court of Appeals for Sixth Circuit

Case No. 75-1322

United States of America, Appellee

v.

Anthony J. Buffa, Appellant

Decided and Filed December 17, 1975.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PER CURIAM. This is an appeal by defendant Buffa from his jury conviction for possession of counterfeit currency with intent to defraud, for fraudulently passing and uttering counterfeit currency, and for willfully and knowingly selling the currency with intent that it be passed as genuine in violation of 18 U.S.C. §§ 472 and 473.

According to testimony of Secret Service agents, Buffa was arrested when he and a confederate sold some $99,200 in counterfeit United States currency to Secret Service agents posing as buyers. Defendant offered to make the sale to the agents, called a friend who was to bring the counterfeit currency to the agents, and arranged to rent two interconnecting hotel rooms in which the transaction was to take place. When defendant's friend arrived, the agent inspected the notes without removing them from the bag in which they were carried and the transaction was completed. When he was arrested shortly after the sale, defendant admitted that he had been in the room at the time of the sale but argued that the transaction was entirely between the agent and defendant's friend.

The principal issue on this appeal is whether the court erred in the following portion of its instructions to the jury:

> While it is necessary that every essential element of the crime charged in the indictment in this case be proved by evidence beyond a reasonable doubt, it is not necessary that each subsidiary fact should be proved beyond a reasonable doubt.

Defendant contends that this instruction was confusing to the jury in that (a) it detracted from the requirement of proof beyond a reasonable doubt; and (b) because the jury, in the absence of any definition or explanation of "subsidiary fact," could not possibly have known what facts were not required to be proved beyond a reasonable doubt.

As no objection was made to this instruction, it cannot be the basis for reversal unless it was plain error. *Singer* v. *United States*, 380 U.S. 24, 38 (1965); *United States* v. *Griffin*, 382 F.2d 823, 828 (6th Cir. 1967). While we recognize that the challenged portion of the court's charge did not explain the meaning or purport of "subsidiary fact," thus opening up the possibility that the jury was misled or confused, we conclude, after a consideration of the remainder of the charge, that it was not plain error.

The court thoroughly and correctly enumerated and explained each element of the offenses with which the defendant was charged, emphasizing to the jurors that all elements must be proved beyond a reasonable doubt. In addition, immediately following the challenged portion of the charge, the court went on to state:

> Evidence should not be considered in fragmentary parts and as though each fact or circumstance stood apart from the others, but the entire evidence should be considered and the weight of the evidence should be determined from the whole body of evidence.

The jury could reasonably infer that all of the *pertinent* facts in their cumulative effect established that the essential

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elements or ingredients of the alleged crimes existed beyond a reasonable doubt. The instruction as a whole so emphatically emphasized that the essential elements of the crimes must be proved beyond a reasonable doubt that it is hardly likely that the jury could have acted under a misconception as to the government's burden of proof.

Other courts which have considered instructions challenged on grounds of misleading statements as to the proper standard of proof in a criminal case have stressed, as we do, that the charge as a whole must convey the idea that the standard is one of proof beyond a reasonable doubt. *See United States* v. *Culp*, 472 F.2d 459 (8th Cir.), *cert. denied*, 411 U.S. 970 (1973); *United States* v. *Smith*, 468 F.2d 381 (3d Cir. 1972); *United States* v. *Christy*, 444 F.2d 448 (6th Cir.), *cert. denied*, 404 U.S. 949 (1971); *United States* v. *Wright*, 365 F.2d 135 (7th Cir. 1966); *United States* v. *Andrews*, 347 F.2d 207 (6th Cir.), *cert. denied*, 382 U.S. 956 (1965). These cases indicate that if the charge as a whole does amply and fully define the appropriate standard, slightly misleading statements, standing alone, or in isolation, will not constitute plain error. Courts have also shown a reluctance to find plain error when the case was not a close one and the evidence against a defendant was overwhelming, as we find the evidence to be in this case. *See United States* v. *Urbanis*, 490 F.2d 384 (9th Cir.), *cert. denied*, 416 U.S. 944 (1974). The principles laid down in these cases are applicable here and support our conclusion that there was no plain error in the district court's charge.

We have considered the other issues raised by defendant on appeal and find them to be without merit.

Accordingly, the judgment of conviction is
AFFIRMED.

APPENDIX B

United States Court of Appeals for the Sixth Circuit

Case No. 75-1322

United States of America, Appellee

v.

Anthony J. Buffa, Appellant

Order Denying Petition For Rehearing

(Entered January 14, 1976)

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

In this action the appellant has filed a petition for rehearing.

After a careful consideration of the entire record, the Court is of the opinion that the petition is without merit.

It is therefore ORDERED and ADJUDGED that the petition to rehear be and it is hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN

Clerk